LACKS: 7/3

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

LAND USE MANAGER

Vol. 7, Edition No. 1
January, 1990

SJC DECISION HAS LIMITED IMPACT ON "ANR" REVIEW

The Massachusetts Supreme Judicial Court has reversed the Appeals Court decision in Corcoran v. Planning Board of Sudbury, 26 Mass. App. Ct. 1000 (1988). In that case, the Appeals Court ruled that a Planning Board could consider the presence of wetlands, which are subject to the Wetlands Protection Act, when reviewing an approval not required plan (See Land Use Manager, Vol. 6, Edition No. 6, August, 1989).

Corcoran submitted a six lot "ANR" plan to the Planning Board. Each lot had the required frontage on a public way. The "ANR" plan showed wetland areas which prevented practical access from the buildable portion of some of the lots to the public way. The plan also showed a 25 foot wide common driveway. Presumedly, the proposed driveway would provide access to those lots which could not directly access onto the public way. The Planning Board refused to endorse the plan and Corcoran appealed.

A Land Court judge ruled that Corcoran was entitled to an "ANR" endorsement. The Planning Board appealed the Land Court judgment and the Appeals Court reversed. The Massachusetts Supreme Court granted further appellate review and affirmed the judgment of the Land Court.

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The Planning Board argued that even though Corcoran's plan met the statutory requirements for an "ANR" endorsement, such technical compliance alone was not enough. The Planning Board claimed that Corcoran was not entitled to an endorsement because the presence of wetlands on the lots prevented practical access to buildable sites in the rear of several of the lots. The Planning Board also noted the judge's finding that not all of the lots could accommodate both a house and its accompanying septic system on dry areas between the road and the wetland.

The Planning Board maintained that this case was governed by Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978) and other decisions which have held that technical compliance with the frontage requirement of the Subdivision Control Law does not in itself entitle a plan to an "ANR" endorsement. (See Land Use Manager, Vol. 6, Editions 2,3,4, and 5, 1989). The SJC disagreed that the rationale contained in Gifford and subsequent cases was applicable to Corcoran's plan.

CORCORAN V. PLANNING BOARD OF SUDBURY
406 Mass. 248 (1989)

Excerpts:

Lynch, J. . . .

Here, by contrast, there is no question that the frontage provides adequate vehicular access to the lots. The presence of wetlands on the lots does not raise a question of access from the public way, but rather the extent to which interior wetlands can be used in connection with structures to be built on the lots. Wetlands use is a subject within the jurisdiction of two other public agencies, the conservation commission of Sudbury and the DEQE. The conservation commission and the DEQE are also authorized to determine the threshold question whether the wet areas are in fact wetlands subject to regulation. This determination involves questions of fact concerning the kind of vegetation in the area in question and whether the wetlands are significant.

Gifford was not intended to broaden significantly the powers of planning boards. See Gallitano v. Board of Survey & Planning of Waltham, 10 Mass. App. Ct. 269, 273 (1980). The guiding principle of Gifford and its progeny is that planning boards are authorized to withhold "ANR" endorsements in those unusual situations where the "access implied by [the] frontage is . . . illusory in fact." Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572, 574 (1987). We conclude that the existence of interior wetlands, that do not render access illusory, is unlike the presence of distinct physical impediments to threshold access or extreme lot configurations that do. That the use of the wetlands is, or must be, subject to the approval of other public agencies (G. L. c. 131, section 40) does not broaden the scope of the board's powers.

The judgment of the Land Court is affirmed. The plaintiffs' plan should be endorsed "approval under the subdivision control law not required."

Right after the Corcoran case, the Massachusetts Supreme Judicial Court decided Long Pond Estates Ltd. v. Planning Board of Sturbridge, 406 Mass. 253 (1989). In Long Pond, the plaintiff had submitted a plan to the Planning Board for "ANR" endorsement. The plan showed three lots, each of which had adequate frontage on Champeaux Road, a public way. However, a portion of the way between the proposed lots was within a flood easement held by the United States Army Corps of Engineers, and was periodically closed due to flooding. Between 1980 and 1988, the Corps of Engineers closed the affected portion of the public way on an average of 33 1/2 days a year.

In refusing to endorse the plan, the Planning Board stated that (1) the existence of the flood easement meant that the public way did not provide adequate access for emergency vehicles to the proposed lots and (2) alternative access to the proposed lots through an abutting town would involve excessive response time. A Superior Court judge decided that the plaintiff was entitled to an "ANR" endorsement. The Planning Board appealed and on its own motion, the SJC transferred the appeal to the High Court from the Appeals Court.

LONG POND ESTATES LTD V. PLANNING BOARD OF STURBRIDGE
406 Mass. 253 (1989)

Excerpts:

Lynch, J. . . .

. . . As authority for its inquiry into the adequacy of Champeaux Road as a public way, the planning board cites cases upholding denials of ANR endorsements based on restrictions on access to the public roads leading to the proposed developments. See McCarthy v. Planning Bd. of Edgartown, 381 Mass. 86 (1980) (limited access highway); Perry v. Planning Bd. of Nantucket, 15 Mass. App. Ct. 144 (1983) (planned yet unconstructed highway); Hrenchuk v. Planning Bd. of Walpole, 8 Mass. App. Ct. 949 (1979) (limited access highway).

The periodic flooding of a portion of the public way that exists here does not bring this case within the ambit of McCarthy, Perry, or Hrenchuk. "[P]lanning boards are authorized to withhold 'ANR' endorsements in those unusual situations where the 'access implied by [the] frontage is . . . illusory in fact.' " Corcoran v. Planning Bd. of Sudbury, ante 248, 251 (1989), quoting Fox v. Planning Bd. of Milton, 24 Mass. App. Ct. 572, 574 (1987). Here, adequate access to the proposed lots is available via ways in a neighboring town during the time when a portion of Champeaux Road is closed due to flooding. Moreover, the distance that Sturbridge emergency vehicles must travel to reach the proposed lots using the alternative route is no greater than the distance they must travel to reach numerous other points within Sturbridge. Thus the undisputed facts disclose that the lots meet the literal requirements for an ANR endorsement and that access is available at all times, albeit occasionally on ways of a neighboring town. For these reasons, we find that the planning board exceeded its authority . . . in refusing to endorse the plaintiff's plan "approval under the subdivision control law not required."

In Corcoran, the court decided that a Planning Board cannot deny an "ANR" endorsement in those instances where other permitting approvals may be necessary before practical access from the lot onto the way will exist. Therefore, the necessity of obtaining wetlands approval under G.L. 131, Section 40, a Title 5 permit, or insuring the availability of water pursuant to G.L. 40, Section 54 are not relevant considerations when reviewing an "ANR" plan. However, a Planning Board review can consider extreme topographical conditions as the Court qualified its decision when it noted that the existence of wetlands, that do not render access illusory, is a different situation than when there exists a distinct physical impediment or unusual lot configuration which would bar practical access.

The Long Pond decision added a variation to the practical access theory in that the principal access to a lot can be temporarily unavailable provided that adequate access for emergency vehicles exists on another way. The interesting aspect of the Long Point case is that, except for the temporary closure of the way due to flooding, the way provided adequate access. Therefore, in order to be eligible for this variation, the landowner must show that the principal access meets the vital access standard and that the second means of access is also adequate for the purposes of the Subdivision Control Law.

An issue not addressed in the Corcoran decision was the existence of a common driveway. A Planning Board should review Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1987) for guidance in this area (See Land Use Manager, Volume 4, Edition No. 7, December, 1987). The Fox decision provides valuable insight concerning common driveways and the vital access standard. For the purposes of an "ANR" endorsement, if it can be determined that each lot can comply with the vital access standard, then the existence of a common driveway is of no concern to the Planning Board. However, common driveways must comply with local zoning regulations. If problems exists relative to the use of common driveways, communities should consider zoning regulations to deal with the issue.

As a minimum, a zoning bylaw should require that access to a lot be over the required frontage or across the front lot line. Absent a common driveway regulation, such a provision would clarify zoning enforcement.

EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

Michael S. Dukakis, Governor
Amy S. Anthony, Secretary

Vol. 7, Edition No. 2
February, 1990

LAND USE MANAGER

RECENT LEGISLATION REGARDING FARM STANDS AND REVIEW FEES

Late in the 1989 legislative session, the General Court enacted two laws that are relevant to local land use boards. The following is a brief summary of the new legislation. We have reproduced the laws which we urge you to read. Please do not rely on our summary as the sole basis of your interpretation.

CHAPTER 481 **AN ACT PROTECTING MASSACHUSETTS FARMING OPERATIONS**

This Act amended Chapter 40A, Section 3, MGL, to prohibit the regulation of protected agricultural uses by special permit. The Act also gives greater protection to the operation of a farm stand. Except for the months of June, July, August and September, a majority of the products for sale do not have to be produced by the owner of the land on which the stand is located. During the above noted months, what constitutes a majority of the products for sale will be determined by either gross sales dollars or volume. The effective date of this Act is March 8, 1990.

CHAPTER 593 **AN ACT RELATIVE TO THE ESTABLISHMENT OF SPECIAL ACCOUNTS FOR CERTAIN MUNICIPAL BOARDS**

This Act amended Chapter 44 of the General Laws by inserting a new section 53 which authorizes the establishment of special accounts for the collection and expenditure of consultant fees.

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Planning Boards, Zoning Boards of Appeals, Boards of Health and Special Permit Granting Authorities may adopt rules requiring fees to be placed into a special account to be used for the employment of outside consultants. Such special accounts are similar to revolving funds as the fees are not deposited into the general fund. Therefore, the review board can make payments to the consultant without the need of an appropriation by the legislative body. Any unused fees, including accrued interest, must be returned to the applicant. The legislation also provides that the rules of the review board contain an administrative appeal to the Board of Selectmen or the City Council as described in the law.

Chapter 593 establishes a process for the creation of special accounts for the collection and disbursement of review fees for outside consultants. However, communities may still charge review fees without taking advantage of this process. The effective date of this Act was December 8, 1989.

Chapter 590.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Eighty-nine

AN ACT PROTECTING MASSACHUSETTS FARMING OPERATIONS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 3 of chapter 40A of the General Laws, as appearing in the 1988 Official Edition, is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:-

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law.

House of Representatives, November 29, 1989.

Passed to be enacted, Robert Consalia Acting, Speaker.

S 2060

In Senate, November 30, 1989.

Passed to be enacted, William M. Bulger, President.

December 8, 1989.

Approved,

Michael S. Dukakis, Governor.

Chapter 5 10.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Eighty-nine

AN ACT RELATIVE TO THE ESTABLISHMENT OF SPECIAL ACCOUNTS FOR CERTAIN MUNICIPAL BOARDS.

Be It enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 21 of chapter 40B of the General Laws, as appearing in the 1988 Official Edition, is hereby amended by inserting after the fourth sentence the following sentence:- The board of appeals shall adopt rules, not inconsistent with the purposes of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk.

SECTION 2. Chapter 44 of the General Laws is hereby amended by inserting after section 53F the following section:-

Section 53G. Notwithstanding the provisions of section fifty-three, any city or town that provides by rules promulgated under section nine or twelve of chapter forty A or section eighty-one Q of chapter forty-one, section twenty-one of chapter forty B or section thirty-one of chapter one hundred and eleven for the imposition of reasonable fees for the employment of outside consultants may deposit such fees in a special account. Such rules shall provide for an administrative appeal from the selection of the outside consultant to the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications. The minimum qualifications shall consist either of an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field. The required time limits for action upon an application by a municipal permit granting board shall be extended by the duration of the administrative appeal. In the event that no decision is made by the city council or the town board of selectmen within one month following the filing of the appeal, the selection made by the municipal permit granting authority shall stand. Such an administrative appeal shall not preclude further judi-

cial review, if otherwise permitted by law, on the grounds provided for in this section. Any such account shall be established by the municipal treasurer in the municipal treasury and shall be kept separate and apart from other monies. The special account, including accrued interest, if any, shall be expended at the direction of the authorized board or authority without further appropriation; provided, however, that such funds are to be expended by it only in connection with carrying out its responsibilities under the law. Any excess amount in the account attributable to a specific project, including any accrued interest, at the completion of said project shall be repaid to the applicant or to the applicant's successor in interest and a final report of said account shall be made available to the applicant or to the applicant's successor in interest. The municipal accountant shall submit annually a report of said special account to the chief elected body and chief administrative official of the municipality for their review. Said report shall be published in the city or town annual report. The municipal accountant shall submit annually a copy of said report to the director of the bureau of accounts.

House of Representatives, November 29, 1989.

Passed to be enacted, Robert Coiro, Acting Speaker.

In Senate, November 30, 1989.

Passed to be enacted, Alexander W. Bulger, President.

December 8, 1989.

Approved,

Michael S. Dukakis, Governor.

MICHAEL S. DUKAKIS
GOVERNOR

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

December 20, 1989

The Honorable Michael Joseph Connolly
Secretary of the Commonwealth
State House, Room 340
Boston, MA 02133

Dear Secretary Connolly:

I, Michael S. Dukakis, pursuant to the provisions of Article XLVIII of the Amendments to the Constitution of the Commonwealth of Massachusetts, the Referendum II, Emergency Measures, hereby declare that, in my opinion, the immediate preservation of the public peace, health, safety or convenience requires that the attached Act, Chapter 593 of the Acts of 1989, entitled "An Act Relative to the Establishment of Special Accounts for Certain Municipal Boards", the enactment of which received my approval on December 8, 1989, should take effect forthwith.

I further declare that, in my opinion, it is in the public interest that this Act take effect immediately in order to enable cities and towns to come into timely compliance with federal law.

Sincerely,

Michael S. Dukakis
Governor

OFFICE OF THE SECRETARY, Boston, Ma December 20, 1989

I, Michael Joseph Connolly, Secretary of State, hereby certify that the accompanying statement was filed in this Office by His Excellency the Governor of the Commonwealth of Massachusetts at five o'clock and four minutes, P.M., on the above date, and in accordance with Article Forty-eight of the Amendments to the Constitution said Chapter takes effect forthwith, being chapter five hundred and ninety-three of the Acts of nineteen hundred and eighty-nine.

Michael Joseph Connolly

Michael Joseph Connolly
Secretary of State.

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EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

Michael S. Dukakis, Governor
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Vol. 7, Edition 4
May, 1990

LAND USE MANAGER

PERIMETER PLANS

A perimeter plan is a plan of land showing existing property lines, with no new lines drawn indicating a division of land. Such plans are usually filed so that the property owner can obtain a three year zoning protection for the land shown on such plan. There has been case law that has looked at the question as to whether a perimeter plan is entitled to an ANR endorsement from the Planning Board.

The Subdivision Control Law is a comprehensive scheme for regulating the creation of new lots and for the recording of plans showing such new lots. There are three sections of the Subdivision Control Law which are relevant to the perimeter plan issue.

1. Section 81-L which defines the term "subdivision" as well as divisions of land that will not be considered a subdivision.

2. Section 81-P which sets out the procedure for endorsement of plans not requiring subdivision approval.

3. Section 81-X which provides a procedure for recording plans which show no new lot lines.

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The first paragraph of Section 81-X states:

> Notwithstanding the foregoing provisions of this section, the register of deeds shall accept for recording and the land court shall accept with a petition for registration or confirmation of title any plan bearing a certificate by a registered land surveyor that the property lines shown are the lines dividing existing ownerships, and the lines of streets and ways shown are those of public or private streets or ways already established, and that no new lines for division of existing ownerships or for new ways are shown.

Should a perimeter plan be recorded only with a certificate of a registered land surveyor under Section 81-X or is a perimeter plan entitled to an ANR endorsement from the Planning Board pursuant to Section 81-L and 81-P?

In Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.), a landowner obtained an ANR endorsement to protect his property from a zoning change. The Planning Board had endorsed the plan which depicted one lot with the exact dimensions and bounds shown on an earlier plan registered with the land court. In finding that the Planning Board had mistakenly endorsed the plan, the court noted:

> As a matter of law, the plaintiffs cannot file their April, 1985, plan in the Land Court. The plan is not a subdivision nor is it a division of land with "approval not required". Lot No. 91 was created in 1960 and registered as noted. As far as the Land Court would be concerned, its status has not changed since 1960. As a matter of law, the Planning Board should not have endorsed the April, 1985, plan. Nevertheless, the action of the Planning Board was not appealed and the legality of its action is not before this Court for review. Once a plan has been endorsed 'approval not required', the Court cannot go behind that endorsement unless the action of the board is before the Court for review. As a matter of law, the plaintiffs are entitled to the three-year protection despite the method by which same was derived. In an exercise of judicial constraint, I make no comment on the methods utilized and with judicial reluctance enter this judgment.

In Horne, the landowner succeeded in protecting his property from the zoning change because the Court could not revoke the Planning Board's endorsement since the issue was not properly before the Court. However, in Malden Trust Company v. Twomey, Middlesex Superior Court C.A No. 6574, September 28, 1989 (McDaniel J.), the Planning Commission declined to endorse a plan ANR which showed no new property lines. In upholding the Commission's decision not to endorse the plan, the court noted:

> . . ., it should be clear that the purpose of section 81P is to relieve certain divisions of land of regulation and approval by a planning board when a proposed plan indicates that newly created lots will be guaranteed access to the outside world by preexisting ways or roads. In sum, section 81P facilitates the recording process, and was "not intended to enlarge the substantive powers of a [planning] board." Thus, when section 81P states that "an endorsement shall be withheld unless such plan shows a subdivision," it is clear from the above discussion that the Legislature intended to expedite the recording of 'non-subdivision' plans, and not to encourage the filing under section 81P of plans showing no subdivision of lots whatsoever. . . . .
>
> Plaintiff's plan shows no division of land and hence there is no need for the verification process of section 81P. Moreover, plaintiff's plan may have easily been filed under section 81X. It is clear that plaintiff instead sought section 81P endorsement to achieve the advantage of the zoning protection provided under G.L. c. 40A, section 6 to those plans endorsed ANR under section 81P. Withholding comment on this tactic, the Court simply states that plaintiff's perimeter plan is properly filed under section 81X, not section 81P. Consequently, the defendant was never under an obligation to endorse plaintiff's plan under section 81P.

The Massachusetts Appeals Court, in Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), noted the need to show a

division of land when submitting an ANR plan. In Perry, the landowner submitted a perimeter plan showing a triangular shaped lot abutted on all three sides by existing ways. The main issue in the case dealt with the adequacy of the ways, but it was also argued whether there was a need to show a division of land in order to be entitled to an ANR endorsement.

Perry argued that his plan was entitled to an ANR endorsement based upon the rationale found in Bloom v. Planning Board of Brookline, 346 Mass. 278 (1963). The Bloom decision involved the division of a tract of land into two parcels. One parcel did not meet the minimum frontage requirement of the zoning bylaw for a building lot. However, the landowner placed a notation on the plan that the parcel didn't conform to the zoning bylaw.

The Supreme Judicial Court held that since the plan showed that the lot with inadequate frontage would be unusable for building, it was not a plan subject to subdivision control. The court observed that by the definition in the Subdivision Control Law, a "lot" is "an area of land . . . used, or available for use, as the site of one or more buildings," and a "subdivision" is "the division of a tract of land into two or more lots . . . ." The court reasoned that a division of land into two parcels, one of which clearly could not be used for building under the zoning law, was therefore not a division into two "lots" and, therfore, not a subdivision.

PERRY V. PLANNING BOARD OF NANTUCKET
15 Mass. App. Ct. 144 (1983)

Excerpts:

Greaney, J. . . .

> In Bloom, the petitioner's plan disclosed the residual lot's inadequacy for building purposes. It was thus clear that the parcel with inadequate frontage was not a section 81L "lot." In the present case, the plan of lot 750 contains no information at all concerning the dimensions or boundaries of the tract from which lot 750 is proposed to be severed. The remaining land may or may not be "available for use . . .as the site of one or more buildings." Unlike the situation in Bloom, Perry's plan is not one "which disavows any claim of existing right to use [the remaining land] as a zoning by-law lot."

> . . . Although an 81P endorsement carries no implication that the subject lots comply with zoning ordinances in all respects, it is expected to address "the fact of adequate frontage of the newly created lots." Where the plan shows on its face that the endorsement was occasioned by the fact that inadequate frontage brought a parcel outside the definition of a section 81L "lot," the danger that the public might be misled into believing the plan showed only buildable lots is dissipated. The Bloom opinion suggests that such noncompliance could be shown by depicting the inadequate frontage on the plan or by an endorsement that the subject lot could not be used for building, but preferably by both methods. Were an 81P endorsement to be granted . . . on the plan as submitted, the public would have no way of ascertaining the basis of the decision from the recorded plan and could be misled as to the adequacy of frontage on a public way. On remand, Perry may amend the plan of lot 750 to show the boundaries and dimensions of the tract from which it is to be severed, and the board need not grant an 81P endorsement unless he does so. If appropriate, assuming the requirements for an 81P endorsement are otherwise met, the board may require a further endorsement of noncompliance with the zoning code on the plan as a condition of approval.

Perimeter plans can be recorded pursuant to Chapter 41, Section 81X, MGL. Such plans, however, are not entitled to the three year zoning protection found in Chapter 40A, Section 6, MGL. Chapter 41 is only concerned with the recordation of plans and what plans require Planning Board approval or endorsement. Chapter 41 does not deal with zoning protection.

Horne v. Board of Appeals, Town of Chatham, Barnstable Superior Court C.A. No. 4635, November 3, 1986 (Dolan J.) and Malden Trust Company v. Timothy Twomey, Middlesex Superior Court C.A. No. 87-6574, September 27, 1989 (McDaniel J.) support the position that as a matter of law, perimeter plans are not entitled to an ANR endorsement. Although Perry states the need to show a division of land in order to obtain an ANR endorsement, under the Bloom rationale, an arbitrary line could be drawn but not necessarily show two lots.

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EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

Michael S. Dukakis, Governor
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Vol. 7, Edition 5
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LAND USE MANAGER

A VARIANCE IS A VARIANCE

It has long been recognized that rights acquired by an existing use or by the construction of a building should continue to be allowed. For many years in Massachusetts, uses which are inconsistent with the zoning bylaw but which predate its adoption or amendment have been exempted from the operation of the new zoning bylaw. In Commonwealth v. Alger, 7 Cush. 53 (1851), the court noted:

> ...all persons who built on their own soil before these [land use] laws, in a manner not amounting to a public nuisance, independently of them, had exercised only their just and lawful right; and any laws, made to punish acts lawful at the time they were done, would be ex post facto, contrary to the constitution and to the plainest principles of justice, and of course inoperative and void.

The key section of the General Laws dealing with the issue of nonconforming structures and uses is Chapter 40A, Section 6, MGL. In recognition of the rationale stated in Alger, the first paragraph of Section 6 provides the following protection:

> Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first

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> publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.

If any change to an existing structure or use is not protected by the above provision, Section 6 also provides the following method whereby a pre-existing nonconforming structure or use may be extended, altered or changed.

> Pre-existing non-conforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.

This particular provision has been cause for concern at the local level. For example, it does not provide what types of procedures apply to the "finding", whether a town can apply standards beyond the required "finding" in evaluating an application, what type of permit must be issued by the finding authority when approving the requested relief, whether a majority or a super majority is required to approve an application or what time limitation is applicable to the finding authority.

Many cities and towns have attempted to deal with the procedural ambiguities by providing in their zoning bylaws a special permit review for applicants wishing to change, extend or alter a pre-existing nonconforming structure or use. See e.g. Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987); Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985).

Rather than establishing their own special permit requirements, many communities have inserted in their zoning bylaws the Section 6 "finding" provision of the Zoning Act. In Walker v. Board of Appeals of Harwich, 388 Mass. 42 (1983), the Massachusetts Supreme Court noted that the Section 6 "finding" provision "authorizes the granting of special permits for changes in existing structures...". The Massachusetts Appeals Court, in Sullivan v. Board of Appeals of Harwich, 15 Mass. App. Ct. 286 (1983) also noted that the power of a municipality to regulate changes in nonconforming uses appeared more clearly under the previous state zoning statute but suggested that it is quite possible that the Section 6 "finding" provision could be read "as authorizing municipalities to provide for extensions or alterations of nonconforming uses by special permit while not requiring them so to provide." If the courts are construing Section 6 as entitling an applicant to the issuance of a special permit when the appropriate board makes the necessary "finding," then it would appear reasonable to assume that the procedural requirements for the issuance of a special permit would apply in the case of a Section 6 special permit finding.

In order for a structure or use to be considered nonconforming for the purposes of the Zoning Act, Section 6 requires that the structure or use be "lawfully in existence or lawfully begun." Depending upon the requirements of the local bylaw, any structure or use that obtains nonconforming status becomes eligible for the Section 6 special permit "finding" or other local special permit process.

Can a structure or use which was authorized by virtue of the granting of a variance be considered a structure or use "lawfully in existence" so as to be treated in the future as nonconforming? This is an important question as the criteria for granting a special permit or a Section 6 special permit is far more liberal than the statutory criteria for the granting of a variance or any extension, modification or renewal thereof.

In Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527 (1990), the owners of a certain parcel of land were granted use variances to erect a construction building and to operate a storage yard for construction materials. The parcel was located in a residential zone where such uses were not permitted. After the variances were granted, the town of Barnstable amended its zoning bylaw to prohibit use variances in certain areas of the community. The construction building and storage yard were located in such an area.

In 1985, the owners of the construction business wished to add a building to their existing use. Because of the zoning change, they were unable to petition the Zoning Board of Appeals for a use variance. However, the owners applied for a special permit pursuant to a provision of the zoning bylaw authorizing the Board to grant a special permit for an increase in the size of an existing nonconforming building or to extend a nonconforming use on the same lot. This particular provision expanded on the Section 6 special permit "finding" provision of the Zoning Act.

The owners reasoned that the existing building was a lawful non-conforming use. The Zoning Board of Appeals granted a special permit authorizing an addition to the existing building. A Superior Court judge ruled that the owners' use of the parcel was not nonconforming. The Appeals Court agreed.

MENDES V. BOARD OF APPEALS OF BARNSTABLE
28 Mass. App. Ct. 527 (1990)

Excerpts:

Kass, J....

> The flaw in the owners' argument lies in a failure to appreciate the statutory meaning of the phrase "nonconforming use." As used in the first paragraph of s.6 of The Zoning Act...and the town by-law, a nonconforming use is one which is lawfully carried on at the time a provision of a zoning code or an amendment to the zoning code is adopted which prohibits that use. So it is that s.6 speaks of "structures or uses lawfully in existence...before the first publication of notice of the public hearing on [the prohibitive zoning] ordinance or by-law." That point, that the rights attaching to nonconformity pertain to a use extant prior to commencement of the process leading to adoption of provisions which prohibit that use, is driven home in the next sentence of the first paragraph of s.6, which sets out the basis on which "[p]re-existing nonconforming structures or uses" may be extended or altered.
>
> Guided by The Zoning Act,...the town by-law describes a nonconforming use as "[a]ny lawful use of a building or premises, or part thereof, existing at a time the zoning by-law was originally adopted in the area in which such building or use is...located."

Again, the reader will note, a use achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it. ...By way of example, if, when the locus was first classified by the town as Residence F, permitting only residential use, a building used for offices and manufacturing ancillary to the construction business had been on the site, that would have been a classic nonconforming use.

In the instant case, since the time the owners first began to use the locus for construction business purposes, the town has adopted no by-law amendment which further restricts or alters the use restrictions which have at all times been impressed on the locus. The owners' use of the premises has never been permitted by the town's zoning regulations and has never been nonconforming in the special sense that it existed "at the time the [use restricting] zoning by-law was originally adopted [or amended]."...Use of the site for the construction business began only after the locus was already zoned for residence use. It came about, not through preexisting right, deprivation of which might raise constitutional questions, but through the after-the-fact dispensation of a variance.

For the purposes of deciding whether a use is nonconforming within the meaning of G.L. c.40A, s.6, the question is not merely whether the use is lawful but how and when it became lawful. It would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use. Variance procedures presuppose the prohibition of the use sought and operate as a safety valve to relieve an owner of real estate from the hardship of compliance with a zoning regulation resulting from particular physical characteristics that burden the real estate. ...The statutory criteria for a variance set out in G.L. c. 40A, s.10, are demanding, and variances are difficult to obtain. ...By comparison, the special permit power presupposes the allowance of certain uses, but only with the sanction of the local permit granting authority acting in accordance with the fairly flexible criterion of "harmony with the general purpose and intent of the ordinance or by-law." ...In view of the different approaches to the grant of a variance and a special permit, the

> former grudging and restricted, the latter anticipated and flexible, we do not think the Legislature intended in G.L. c. 40A, s.6, to authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special permit. ...For the reasons stated, the administrative remedy of seeking expansion of a nonconforming use was not available to the owners.

A nonconforming structure or use is one which lawfully exists prior to a zoning bylaw or amendment, but is maintained afterward even though it does not conform to the new zoning requirement. The existence of a nonconforming structure or use is determined as of the date of the first publication of notice of the public hearing on the bylaw. See Tamerlane Realty Trust v. Board of Appeals of Provincetown, 23 Mass. App. Ct. 450 (1987). It should be noted that structures or uses will be protected from a zoning change and considered lawful if constructed or commenced pursuant to the applicable building permit, special permit or subdivision plan freeze of the Zoning Act.

A structure or use does not obtain nonconforming status due to a self-inflicted nonconformity. See Marblehead v. Deery, 356 Mass. 532 (1969) where a subdivision plan changed a nonconforming structure to an unprotected structure.

The grant of a variance to construct a building or allow a use does not create a nonconforming structure or use. A variance is a variance.

Large Lot Zoning Held Invalid

On April 25, 1988, the town of Chilmark adopted an overlay zoning district entitled "Tea Lane District." The new zoning district was created to protect the historic character or Tea Lane which derived its historic value from an incident during the tea embargo prior to the American Revolution. In order to protect the historic character and safety of the public using the road, the town amended its zoning to require a minimum lot area of 5 acres in the Tea Lane District. See Land Use Manager, Vol. 5, Edition No. 8, October, 1988.

On appeal, the Land Court has ruled that the Tea Lane overlay district is invalid. Pearlson v. Town of Chilmark, (Dukes) Misc. Case No. 129860, January, 1990. The judge concluded that the minimum lot size was intentionally exclusionary in nature.

The judge noted that:

> "...the fear of overdevelopment as perceived by some members of the Planning Board seem exaggerated when growth or lack thereof during the past nine years is considered. Protection of flora and fauna comes perilously close to what the Court held required eminent domain action in Aronson. Construction of homes does indeed increase the likelihood of nitrogen loading, but it does not appear that the threat is such that the five acre standard is a rational method of prevention when balanced against damage to the owner, often nonresident, by the requirement of such a large minimum lot size in this area. I can only conclude that the measure basically is anti-growth and exclusionary in nature. This conclusion is reinforced by the fact that Tea Lane is a public way open to all, not just to area home owners."

Communities Must Pay For Landfill Design

Communities that choose to operate landfills must comply with new regulations adopted by the Department of Environmental Protection. In Town of Norfolk v. Department of Environmental Quality Engineering, 407 Mass. 233 (1990), the court ruled that the local mandate provision of Proposition $2\frac{1}{2}$, which relieves municipalities from certain expenditures mandated by State regulations, had no application to a DEP regulation requiring the town to construct an impervious liner to prevent ground-water pollution as a condition to the approval of a proposed expansion to the town's landfill. The total cost for the installation of the liner would be about 1 million dollars. The court ruled that since the town had voluntarily chosen to participate in this heavily regulated industry, it thereby subjected itself to the same conditions and costs that are accepted by a private party engaged in the same activity.

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LAND USE MANAGER

THE 81-FF EXEMPTION

In past editions of the Land Use Manager, we have explored the protection afforded certain lots from increases in local zoning requirements. See Land Use Manager, Vol. 3, Edition No. 1 (January 1986). The Subdivision Control Law also provides a protection to certain recorded lots from complying with the subdivision rules and regulations adopted by the Planning Board. Chapter 41, Section 81-FF, MGL, deals with the applicability of the Subdivision Control Law to previously recorded plans and provides relief to good faith purchasers of individual building lots. With respect to unregistered land, the first paragraph of Section 81-FF provides the following:

> ... recording of the plan of a subdivision in the registry of deeds before the subdivision control law was in effect in the city or town in which the subdivision was located shall not exempt the land within such subdivision from the operation of said law except with respect to lots which had been sold and were held in ownership separate from that of the remainder of the subdivision when said law went into effect in such city or town, and to rights of way and other easements appurtenant to such lots; and plans of subdivisions which were recorded in the registry of deeds and subdivisions made without the recording of a plan after said law

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had gone into effect in such city or town and before February first, nineteen hundred and fifty-two, without receiving the approval of the planning board of such city or town, shall have the same validity and effect as if the subdivision control law became effective in such city or town on February first, nineteen hundred and fifty-two, as above provided.

As to the protection afforded registered land, the second paragraph of Section 81-FF provides:

> So far as land which has been registered in the land court is affected by said law, any plan of a subdivision which has been registered or confirmed by said court before February first, nineteen hundred and fifty-two, whether the subdivision control law was in effect in the city or town in which the subdivision was located or not, and whether the plan of the subdivision was approved by the planning board or not, shall have the same validity in all respects as if said plan had been so approved, but the land court shall not register or confirm a plan of a subdivision in a city or town in which the subdivision control law is in effect which has been filed on or after February first, nineteen hundred and fifty-two, unless it has first verified the fact that the plan filed with it has been approved by the planning board, or would otherwise be entitled if it had related to unregistered land, to be recorded in the registry of deeds....

Under the provisions of the first paragraph of Section 81-FF, the recording of a plan does not exempt unregistered lots within a subdivision except with respect to those lots which had been sold and were held in "ownership separate" from that of the remainder of the subdivision when the Subdivision Control Law went into effect in the community. This lot protection also extends to unapproved plans and subdivisions made after the Subdivision Control Law took effect but recorded prior to February 1, 1952.

The court discussed the "ownership separate" provision in Clows v. Planning Board of Middleton, 12 Mass. App. Ct. 129 (1981), when examining whether two parcels of land were entitled to ANR endorsements from the Planning Board. One parcel consisted of 10 lots containing an area of 42,340 square feet and the other parcel consisted of 8 lots containing an area 48,600 square feet. The lots were shown on a plan which had been recorded in the registry of deeds

prior to the Subdivision Control Law taking effect in the town of Middleton. The case was remanded to the Superior Court because it was unclear as to whether the parcels in question were held in isolation from the original subdivision on the date Middleton adopted subdivision control. However, in reviewing the first paragraph of Section 81-FF, the court noted that at best, each parcel would be treated as one lot for the purposes of the 81-FF exemption.

CLOWS V. PLANNING BOARD OF MIDDLETON
12 Mass. App. Ct. 129 (1981)

Excerpts:

Kass, J....

> a person who owns a single lot which was conveyed to him or his predecessor in title out of a recorded - but unapproved - subdivision enjoys "grandfather" privileges for that lot if the conveyance out of the subdivision occurred prior to the date on which the town where the land is located adopted the Subdivision Control Law.... We do not mean to suggest that the grandfather rights which s.81FF confers apply solely to persons who have purchased only one lot on an "uncontrolled" plat. During the early decades of this century tracts were often laid out in small lots which were combined to make one building parcel which would meet the needs of the buyer or the lot size requirements of zoning laws. An owner of such a parcel, if a person different from the owner of the remainder of the subdivision, would have the benefit of s.81FF. By contrasting example, therefore, the owner of 1,200 lots in a recorded subdivision of over 1,800 lots who has purchased them from the original owner prior to the adoption of the Subdivision Control Law, and, in a literal sense, owns them separately from the other 600 lots, is not, should he desire to break his tract into smaller parcels, exempt from subsequently enacted subdivision control....

If a person who owned a large tract carved from an old uncontrolled subdivision could (such tract being literally separate from the remainder of the original subdivision), after adoption of subdivision control, secure exemption from the Subdivision Control Law under s.81FF by presenting, seriatim, clusters of lots, each cluster drawn from the tract held in ownership separate from that of the original entire uncontrolled subdivision, it would be quite possible by such a tactic to develop an entire tract free of subdivision control.... Construing s.81FF to permit such a course of conduct would be inconsistent with our duty to interpret the statute so as to further a principal object of the Subdivision Control Law, viz.: to ensure efficient vehicular access to each lot in a subdivision.... Nor would such an application of s.81FF be consistent with its limited purpose of exempting parcels isolated from the remainder of the old subdivision before Subdivision Control Law came into effect.

The recording of a subdivision plan in the registry of deeds will protect lots, and the rights of way and other easements appurtenant to such lots, from the operation of the Subdivision Control Law if such lots were separately held prior to the Subdivision Control Law taking effect in the community. At issue in Toothaker v. Planning Board of Billerica, 346 Mass. 436 (1963), was the meaning in Section 81-FF of appurtenant rights of way. The plaintiffs owned approximately 1,200 lots shown on a subdivision plan of over 1,800 lots. The subdivision plan was recorded in 1914. The Subdivision Control Law became effective in Billerica on March 3, 1951. Of the lots shown on the 1914 plan, 649 were protected by Section 81-FF. The plaintiffs submitted a plan to the Planning Board showing a division of land into a number of lots which fronted on ways which were shown on the 1914 plan. Some of the ways had been partially graded and others were partly covered with brush and trees. Several of the ways were dead ends and others joined an unaccepted way bounding the tract. The court ruled that the plan was subject to the Subdivision Control Law and that the rights of way of exempted lots could not be destroyed.

TOOTHAKER V. PLANNING BOARD OF BILLERICA
346 Mass. 436 (1963)

Excerpts:

Whittemore, J....

> At issue, therefore, is the meaning of the exemption in s.81FF of appurtenant rights of way. We hold that the words emphasized in the foregoing quotation from s.81FF relate only to each lot sold before the subdivision control law became applicable and refer to the substance of the rights of way or easements appurtenant thereto. The words of the statute do not exempt the owners of the other lots from compliance with the subdivision control law. Nor does the statute fix the location of extent of the rights of way appurtenant to lots sold before the subdivision control law became applicable. Those rights are determined by the private grants....
>
> Of course, both the owners and the planning board must so apply the law that the existing exempt rights of way of the lots separately owned...are not destroyed or substantially limited or interfered with. The agreed facts do not set out the precise language by which the rights of way were granted to the buyers of the lots sold "over the street upon which...[the lot] is located..." It appears likely from this statement in the agreed facts that there is no more definition of the course of the way than is contained in a reference to the way on which the lot is located and that all that was granted in each case was a right of way to one or the other of the public ways, whichever is nearer.... In any event, nothing would preclude application of regulations requiring construction of ways and installation of municipal services.
>
> Whatever the precision of definition of the private rights of way, the planning board, as a condition of approving a subdivision plan for the plaintiffs' land, may impose any lawful requirements, and may disregard the 1914 plan and its scheme except...as...is necessary in order to

leave the lots which were separately owned in 1951 with the substance of their rights of ways. For example, although there is no suggestion in the agreed facts that, apart from the lack of dead-end turning circles, the 1914 ways are too narrow, nothing in the exemption would bar a requirement of greater width for so much of a way as is not adjacent to an exempt lot. Wise planning might point to eventual widening of a way throughout its entire length by acquiring by purchase or eminent domain the necessary part of the frontage of an exempt lot.

The broad purpose of the subdivision law calls for a consistent construction of its exemption provisions. The purpose is set out in G.L. c.41, s.81M. Except only as stated, any or every aspect of this statutory purpose may be served in applying the law to the plaintiffs' land.

With respect to registered land, the second paragraph of Section 81-FF validates all plans which were registered or confirmed by the Land Court before February 1, 1952. It further provides that after that date the Land Court shall not register or confirm a plan of land in a subdivision in a community where the Subdivision Control Law is in effect unless the plan had been approved by the Planning Board or would have been otherwise entitled, if it was unregistered land, to be recorded in the registry of deeds.

The second paragraph of Section 81-FF states that old recorded plans of registered land "shall have the same validity in all respects as if said plan had been so approved [under the Subdivision Control Law]". In Stoner v. Planning Board of Agawam, 358 Mass. 709 (1971), the Planning Board had constructively approved a subdivision plan by failing to act in a timely manner. The court noted that although the plan was constructively approved, the Planning Board had the authority to require the property owner to furnish an adequate performance guarantee for the construction of ways and the installation of municipal services. The necessity of obtaining an adequate performance guarantee was also stressed in Richard v. Planning Board of Acushnet, 10 Mass. App. Ct. 216 (1980), where the court noted:

We are of the opinion that exception (b) of the definition of "Subdivision" in 81L requires either that the approved ways have been built, or that there exists the assurance required by s.81U that they will be built. Otherwise, the essential design of the subdivision control law-that ways and municipal services shall be installed in accordance with specific municipal standards-may be circumvented.

The second paragraph of Section 81-FF does not appear to eliminate the requirement that adequate performance guarantees be obtained for such plans. Also, presumably such plans would be subject to the provisions of Section 81-W relative to the modification, amendment or rescission of previously approved subdivision plans.

MASSACHUSETTS FEDERATION OF PLANNING AND APPEALS BOARDS

The Massachusetts Federation of Planning and Appeals Boards will hold its 76th Annual Conference on Saturday, October 13, 1990, at the Best Western Royal Plaza in Marlborough.

This year, in conjunction with the American Planning Association, the Federation will be presenting a variety of workshops dealing with land use related issues. The following workshops have been tentatively scheduled:

- The Site Plan Review Process
- The Comprehensive Permit Process
- Comprehensive, Master and Strategic Plans: Defining the Differences
- How to Select and Work with a Consultant

In addition, the conference will also include sessions which will review recent changes to state regulations as well as recent court decisions which have an impact on land use.

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LAND USE MANAGER

REPETITIVE PETITIONS

As a general rule, a Zoning Board of Appeals or Special Permit Granting Authority, which has denied an application, is not permitted to reverse itself unless a change of circumstances has occurred which materially affects the merits of the case. If it were otherwise, there would be no finality to proceedings before such boards. If parties could repeatedly return to the same board seeking the same request under the same conditions, there would be the danger that the board and objectors would be harassed and their resistance worn down. As the court noted in Bright v. Zoning Board of Appeals, 183 A.2d 603 (1962), "to allow a board to revoke former actions without a change in circumstances would permit interested parties to be unduly harassed and injured through being called upon to contest repeated and frequently recurring agitations pertaining to the same subject matter."

Absent a statute which authorizes a board to rehear an application, courts have held that a board is without general authority to reconsider the same matter. The authority to review a Zoning Board of Appeals' or Special Permit Granting Authority's decision is vested in the courts.

In some jurisdictions, the question of reapplication is governed by statute. Such statutes prohibit the filing of a new application within a specified period after the application has been denied by the board. Such a restriction does not prevent the filing of an application for a substantially different purpose within such time period.

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Since 1954, the zoning statute in Massachusetts has contained a repetitive petition provision. Prior to a major rewrite of the Zoning Enabling Act in 1975, the state statute provided the following:

> After acceptance of this section or corresponding provisions of earlier laws . . . no appeal or petition . . . for a variance . . . and no application . . . for a special exception . . . which has been unfavorably acted upon by the board of appeals shall be considered on its merits by said board within two years after the date of such unfavorable action except with the consent of all but one of the members of the planning board; or of the board of selectmen in a town having no planning board; . . ..

The 1975 comprehensive revision of the Zoning Act, St. 1975, C. 808, s.3, required that the Zoning Board of Appeals make a written finding of a specific and material change and that the repetitive petition obtain Planning Board consent after notice is given to parties in interest. The repetitive petition provision of the Zoning Act, Chapter 40A, Section 16, MGL, presently reads as follows:

> No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, . . . specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.

The repetitive petition provision is silent on the process that should be followed when entertaining a repetitive petition. Does a Planning Board give its consent before the Zoning Board can consider the merits of the petition or does the Zoning Board make the necessary finding and act on the petition before the applicant seeks Planning Board consent? In Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981), the court stated that the policy which underlies

the repetitive petition provision is "to give finality to administrative proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue." Having this policy in mind, it would seem logical that an applicant obtain Planning Board consent before presenting his petition to the Zoning Board of Appeals. The court in Paquin v. Board of Appeals of Barnstable, 27 Mass. App. Ct. 577 (1989) appears to favor such a process when it noted:

> the language of s.16 leaves it unclear whether a planning board's function is simply to approve reconsideration by a board of appeals or to endorse favorable action. It is the former, which appears likely, the board of appeals could not even consider the merits of the repetitive petition until the planning board approved.
>
> The former s.20 of G.L. c. 40A called only for planning board approval of consideration on the merits of a subsequent petition. See Shalbey v. Board of Appeals of Norwood, 6 Mass. App. Ct. 521, 527 n.8 (1978).

However, the central question presented in Paquin was whether the constructive grant provisions of the Zoning Act applies to a repetitive petition for a variance. Chapter 40A, Section 15, MGL, provides that failure of a Zoning Board of Appeals to act on a petition for a variance within 100 days after the petition has been filed with the municipal clerk will constitute a grant of the variance. The repetitive petition provision of Section 16 of the Zoning Act contains no time period for action by either the Zoning Board of Appeals or the Planning Board when considering a repetitive petition.

The purpose of the constructive grant provision in Section 15 of the Zoning Act is to induce the Zoning Board of Appeals to act promptly. Paquin argued that the procedural requirements of Section 15 should also apply to the Section 16 repetitive petition provisions to further the purpose of timely action.

PAQUIN V. BOARD OF APPEALS OF BARNSTABLE
27 Mass. App. Ct. 577 (1989)

Excerpts:

Warner, J. . . .

> While we must give statutes a reasonable construction so that the purpose of the Legislature may be accomplished, . . . "we will not 'read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.'" . . . Moreover, we should not make a construction which may produce an unworkable scheme or one which allows for frustration of function.
>
> In the case of an original application or petition, the constructive grant provision of s.15 applies to proceedings which are entirely within the board of appeal's control. In the case of a repetitive petition, s.16 introduces the additional element of planning board approval. The board of appeals has no authority over the planning board's timing of its hearings or decisions. If a planning board does not act, purposefully or not, within the time frame prescribed for board of appeals action under s.15, could the Legislature have intended that an application be deemed granted by the board of appeals? We hold that it did not and that the constructive grant provision of s.15 does not apply to a repetitive petition filed under s.16. To conclude otherwise would open the possibility of the planning board, in effect, exercising an essential function of the board of appeals.
>
> Section 16 requires planning board involvement only as a precedent to **favorable** board of appeals action. It might be argued that nothing in s.16 prevents a board of appeals from acting (without planning board consent) **unfavorably** on a repetitive petition (either on a finding that the requisite change has not been shown or on the merits) within the time constraints set out in s.15. However,

a board of appeals, finding "specific and material changes" in a petition under s.16, might be **favorably** disposed to grant a variance but also to attach appropriate "conditions, safeguards and limitations." G.L. c.40A, s.10. Planning board inaction or delay - if a constructive grant were the result - would frustrate the imposition of such restrictions.

While some time limits (both as to threshold and final decision) on planning board and board of appeals action on a repetitive petition would appear to be consistent with legislative intent to prod prompt decision once votes are made which allow reconsideration, those are, in the circumstances, matters calling for explicit consideration and the exercise of judgment by the Legislature. The legislative history of the addition of the constructive grant provision in s.15 lends some support to a conclusion that the failure expressly to deal with the consequences of inaction on a repetitive petition under s.16 may have been inadvertent. The constructive grant amendment to s.15 was made for the first time late in the legislative process of the revision of G.L. c. 40A by amendment from the Senate floor. See 1975 Senate Journal at 2215. Although we are not called upon to address the question in this case, the amendments to s.15 by St. 1987, c. 498, s.3, do not on their face appear to relate to a repetitive petition under s.16. No change has been made in s.16 since its enactment in 1975.

In Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981), the Zoning Board of Appeals denied an application for a special permit to build an addition to a motel. The owner of the motel filed an altered application seeking a determination that the second application contained specific and material changes from the first application. The Planning Board, by a unanimous vote, consented to the renewed application. This was the first time that the court was faced with the issue of what constitutes a specific and material change from the initial special permit application. It was decided that in such discretionary matters, the court will defer to the local review board's determinations.

RANNEY V. BOARD OF APPEALS OF NANTUCKET
11 Mass. App. Ct. 112 (1981)

Excerpts:

Kass, J. . . .

> What constitutes a sufficiently revised reapplication for zoning relief has not been previously discussed in our decisions. In considering the question we have in mind the policy which underlies statutory texts such as s.16: to give finality to administrative proceedings and to spare affected property owners from having to go repeatedly to the barricades on the same issue. . . .. Bois v. Manchester, 113 N.H. 339, 341 (1973). Note, "Zoning Variances," 74 Harv.L.Rev. 1396, 1399-1400 (1961). 7 Rohan, Zoning and Land Use Controls s.51.07[1] (1979). 3 Yokley, Zoning Law and Practice s.18-10 (1979).
>
> On the other hand there is merit in allowing the local permit granting authority some flexibility in reconsidering a request for a special permit in the light of altered conditions. Not least of all, this offers the possibility of land use solutions sufficiently acceptable to the contending parties to keep the matter out of the courts.
>
> To the extent that the local board makes findings that a reapplication is accompanied by circumstances which are specifically and materially different, such a local determination ought to receive the deference from a reviewing court which is generally accorded to the discretionary aspects of local zoning decisions. . . . Whether the plans or the surrounding conditions have changed sufficiently to justify a reapplication during the moratorium period is principally for the local board to determine. . . . The board may give weight to differences which in an absolute sense are relatively minor. . . .
>
> It has always been supposed that if an application disclosed a project materially different from the one first introduced, the bar of s.16 . . . would not stand in the way. . . . The substitution of an apartment building for a

motel wing or an office building for a store block would be an example of an undertaking so fundamentally different from that first proposed as not to confront the barrier of s.16. Necessarily, then, the specific and material changes which s.16 requires must be something less than differences so radical that they obviate scrutiny under the statute altogether. The board cited the following as significant and material changes:

1. revision of the outdoor lighting plan so that all lights were flush with the ceiling and elimination of direct lights or fixtures from an elevation twenty feet above the level of the parking area;

2. installation of blackout drapes in the windows of the proposed addition;

3. installation of sound insulating materials in the exterior walls of the proposed addition so as to suppress noise;

4. landscaping of parking area along its westerly boundary with an eight foot privet hedge.

Each of these modifications was responsive to a ground of refusal mentioned by the board in its rejection of the first application. While each of the changes taken in isolation has a cosmetic quality, taken together they resulted in a less intrusive building, and it was this intrusive character which evoked the initial rejection. We are of the opinion that the board was warranted in concluding that changes directly responsive to the board's initial objections were specific and material within the meaning of the statute. The board's findings also suggest that the board regarded itself as having acted on erroneous information in concluding initially that the proposed motel addition would adversely affect traffic on North Beach Street and the value of nearby residential properties. To the extent that the board thought itself in error about underlying assumptions concerning the proposal, this constituted a change of circumstances which permitted the board to entertain a second application for zoning relief. We have considered and reject the objectors' contention that a hearing on a second application should be limited to evidence received at the hearing on the first application. No such limitation is implied, let alone expressed, in the statute or our decisions.

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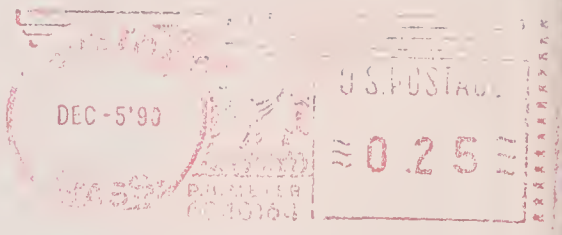

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Michael S. Dukakis, Governor
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LAND USE MANAGER

PERIMETER PLANS

YOU BE THE JUDGE

In Volume 7, Edition No. 4 (May, 1990), of the Land Use Manager, we reviewed recent lower court decisions dealing with the issue of perimeter plans. The cases we reviewed supported the position that perimeter plans are not entitled to an "approval not required" (ANR) endorsement from the Planning Board.

Bart J. Gordon, Esq., of Bulkley, Richardson and Gelinas, and Paul L. Feldman, Esq., of Davis, Malm and D'Agostine, are of the opinion that a Planning Board has no choice and must endorse a perimeter plan. They have written an article supporting their contention which we have reproduced in this edition of the Land Use Manager. We feel their analysis will be useful to local officials as it presents arguments that might be raised by a landowner seeking an ANR endorsement for a perimeter plan.

If it were not for the fact that ANR plans are entitled to a zoning protection pursuant to the provisions of the Zoning Act, there probably would be little interest as to whether a perimeter plan should receive an ANR endorsement. In their article, Mr. Gordon and Mr. Feldman note that perimeter plans are entitled to zoning protection, citing Cape Ann Development Corp., Wolk, and Samson (where Planning Boards had endorsed or failed to seasonably act on perimeter plans). These cases, however, did not decide that perimeter plans must be endorsed by the Planning Board.

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The focus of our Land Use Manager was not on zoning protection but whether a perimeter plan is entitled to an ANR endorsement under the provision of the Subdivision Control Law. As noted in the following article, Section 81-P states that an endorsement shall not be withheld unless the plan shows a subdivision. Section 81-P deals with the process for endorsement. Whether a plan requires approval or not is determined under Section 81-L, the definition of subdivision, which defines when a division of a tract of land will not constitute a subdivision.

We agree that there is an obligation on the part of the Land Use Manager to point out both sides of disputed issues. The cases referred to in the Land Use Manager dealt with the question of whether a plan of land was entitled to an ANR endorsement. Again, it is our belief that Twomey, Horne and Perry support the position that unless a plan shows a division of land it is not entitled to an ANR endorsement and we are unaware of any cases which have reached a different conclusion.

We wish to thank Mr. Gordon and Mr. Feldman, who are notable land use attorneys, for taking the time to express their views. We would now suggest that you read the following article and Vol. 7, Edition No. 4 of the Land Use Manager.

Are perimeter plans entitled to an ANR endorsement?
You be the judge.

CORRECTION

It has come to our attention that there is a typographical error in Vol. 7, Edition No. 4 (May, 1990) of the Land Use Manager. On page 3, where we reproduced excerpts from Malden Trust Company v. Twomey, please note the following correction:

In the first paragraph of the excerpt, the word "not" should be inserted after the word "shall" in line 11 so that lines 10 and 11 will read as follows:

> Thus, when section 81P states that "an endorsement shall not be withheld unless such plan ..."

Perimeter Plans Are Entitled To ANR Endorsement

By Bart J. Gordon and Paul L. Feldman

In Land Use Manager, vol. 7, Edition 4, May, 1990, on Perimeter Plans, Donald Schmidt suggests that a perimeter plan -- a plan showing the circumference of property and not dividing the property into two lots -- is not entitled to an endorsement under G.L. c. 41, §81P. Mr. Schmidt relies on two Superior Court decisions that suggest that a planning board need not endorse a perimeter plan as "approval not required" ("ANR") under the Subdivision Control Law. The absence of such endorsement may be intended to deprive the plan of any zoning freeze protection under G.L. c. 40A, §6, sixth paragraph. Planning boards who wish to prevent such freezes may rely on the Land Use Manager to justify refusal to give an ANR endorsement. Such reliance, however, is misplaced and may result in significant litigation.

The sole inquiries for a Planning Board when reviewing a request to endorse an ANR plan is whether the plan shows a sudivision of land and whether vital access is assured. A perimeter plan does not show a subdivision of land. It is a plan of existing ownership, and no new boundaries are created. Nonetheless, despite questions raised by the Superior Court decisions, they are plans which the Planning Board must endorse under G.L. c. 41, §81P. The statute is clear:

> "Any person wishing to cause to be recorded a plan of land situated in a ... town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such ... town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall

> forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words 'approval under the subdivision control law not required' or words of similar impact with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision" (emphasis added).

The language of the statute says that if the plan does not show a subdivision, a planning board must endorse it. The fact that a plan under G.L. c. 41, §81X, could be recorded with a surveyor's certificate (of no new lines of division of existing ownership) does not provide a board with a basis for failure to endorse a perimeter plan. If the planning board fails to act on endorsing the plan, an applicant is entitled to a certificate from the town clerk and the failure to act has the effect of an endorsement.

There are several appellate decisions acknowledging planning board endorsement of perimeter plans and the effect of a failure to endorse. See Cape Ann Development Corp. v. Gloucester, 371 Mass. 19 (1976):

> In December, 1972, Cape Ann submitted a 'perimeter plan' of the locus to the Gloucester Planning Board, requesting that the plan be endorsed subdivision approval not required. See G.L. c. 41, §81P. A city clerk's certificate concerning the failure of the planning board to act seasonably, equivalent in effect to such an endorsement (G.L. c. 41, §81P), was obtained and recorded with the 'perimeter plan' in the registry of deeds."

See Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976): "the planning board's endorsement under G.L. c. 41, §81P, on his 'perimeter plan'...." Samson v. San Land Development Corp., 17 Mass. App, Ct. 977, 978 (1984): "On January 26, 1972, San-Land filed a perimeter plan with the planning board and

obtained its stamp indicating that subdivision approval was not required. See G.L. c.41, §81P." Each of these cases makes clear that the zoning freeze protections of G.L.c. 40A, §6, apply to perimeter plans. We have found no reported appellate case in which a planning board was upheld in refusing to endorse a perimeter plan, although the Malden Trust Company v. Twomey, Middlesex Sup. Ct. 6574 (Sept. 28, 1989), decision does reach this result.

Section 81P twice uses the word "shall" to describe the planning board's obligation to endorse a plan if it does not show a subdivision. "The word 'shall' in a statute is commonly a word of imperative obligation and is inconsistent with the idea of discretion." Johnson v. District Attorney for the Northern District, 342 Mass, 212, 215 (1961). The Superior Court cases turn the mandatory "shall" into a discretionary "need not."

To reach this result, a court must disregard the language of G.L. c. 41, §81P, and existing appellate decisions construing it. The Superior Court decisions pointedly avoid the policy issue of whether perimeter plans should receive zoning freeze status. Indeed, despite language in Horne v. Board of Appeals of Chatham, Barnstable Sup. Ct. 46345 (Nov. 4, 1986), that the planning board "should not have endorsed" the perimeter plan, the Court held that the endorsement (even if erroneous) conferred a zoning freeze. A large body of law exists construing zoning freezes. See B.J. Gordon and R.C. Davis, Zoning Freezes, Chapter 7, Massachusetts Zoning Manual, (MCLE, 1989). While planning boards may be

frustrated by a landowner's attempt to secure some protection from a rezoning which might have catastrophic economic impact, the Legislature in G.L.c. 40A, §6, has struck a balance to afford landowners some protection against changes while a project is under development. One may disagree with the statute, but, until it is amended, it is the law.

There is an obligation on the part of Land Use Manager to point out both sides of disputed issues. As is indirectly suggested, by reference to the cases of Bloom v. Planning Board of Brookline, 346 Mass. 270 (1983), and Perry v. Planning Board of Nantucket. 15 Mass. App. Ct. 144 (1903), a landowner may avoid a planning board's refusal to endorse a perimeter plan by filing a plan with a division into lots but adding a notation that the lots may not conform to the zoning by-laws or that one of the lots is not a buildable lot. The Bloom and Perry cases suggest that a freeze may be obtained by filing a perimeter plan with an aribitrary line of division, requiring an ANR endorsement. There is no policy reason to require such a tactic, particularly where the language of §81P is unequivocal. Further, a planning board's failure to give an §81P endorsement should - if the plan does not show a subdivision - lead to a clerk's certificate and the same result.

For these reasons, Land Use Manager and the Twomey case may be incorrect in suggesting that a perimeter plan is not entitled to ANR endorsement. The statutory language, appellate case precedent, and the policy underlying zoning freezes support a

contrary interpretation. Until G.L. c. 41, §81P, or c. 40A, §6, sixth paragraph, are changed, our position is that a planning board has no choice regarding endorsement of perimeter plans. Under the statute, if no subdivision is shown, the board must provide the statutory endorsement. If it fails to act, the town clerk must so certify and the effect of endorsement is achieved.

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Vol. 7, Edition No. 9
November, 1990

LAND USE MANAGER

THE SEVEN-MONTH ZONING PROTECTION

Through the years, one prime concern of the Legislature has been to protect certain divisions of land from future changes in local zoning requirements. The fifth paragraph of Chapter 40A, Section 6, MGL, protects land shown on preliminary or definitive plans from all zoning changes for a period of eight years. If a preliminary plan is submitted, a definitive plan must be submitted within seven months. The eight-year protection period runs from the date of the Planning Board's endorsement of its approval of the definitive plan. Chapter 40A, Section 6 provides as follows:

> If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted... before the effective date of [the] ordinance or by-law, the land shown on such plan shall be governed by the... zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval,...

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Chapter 40A, Section 6 further provides that if a Planning Board disapproves a definitive plan, a landowner can preserve his zoning protection by filing an appeal pursuant to Section 81BB of the Subdivision Control Law. Such an appeal will protect the land shown on such plan from any zoning amendment which becomes effective after the filing date of the preliminary plan.

The zoning in effect is the zoning regulations which have been adopted by the City Council or Town Meeting. The publication of the public hearing notice by the Planning Board does not prevent a landowner from filing a subdivision plan to protect his land from future zoning changes. Chapter 40A, Section 5, MGL, provides:

> The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty.

The net effect of Chapter 40A is to impose a moratorium on the application of new and more stringent zoning requirements imposed by an amendment to a zoning ordinance or bylaw which occurs subsequent to the submission of a plan under the Subdivision Control Law provided the plan is duly approved by the Planning Board.

The review of a proposed subdivision of land is governed by the provisions of the Subdivision Control Law, Chapter 41, Sections 81K-81GG, MGL. The Subdivision Control Law establishes an orderly process so that a subdivision plan will receive the approval of a Planning Board if the plan conforms to the reasonable rules and regulations of the Board. Section 81U contains the procedural requirements for approval, modification or disapproval of a definitive plan. The second paragraph of Section 81U provides:

> In the event of disapproval, the planning board shall state in detail wherein the plan does not conform to the rules and regulations of the planning board or the recommendations of the health board or officer and shall revoke its disapproval and approve a plan which, as amended conforms to such rules and regulations or recommendations.

There have been many court decisions that have dealt with the relationship between the operation of the Subdivision Control Law and the grandfathering provisions of the Zoning Act. Recently, in Arenstam v. Planning Board of Tyngsborough, 29 Mass. App. Ct. 314 (1990), the court had to interpret the extent of the seven month zoning protection for land shown on a preliminary plan filed with the Planning Board.

In Arenstam, a landowner had filed a preliminary plan prior to the town amending its zoning bylaw. The new zoning bylaw prohibited commercial or industrial development on his parcel. Exactly seven months after submission of the preliminary plan, a definitive plan was filed with the Planning Board. The plan was eventually disapproved by the Planning Board because it did not comply with their rules and regulations or with the old zoning bylaw in effect at the time of the submission of the preliminary plan. At a later date, the landowner made the necessary corrections and resubmitted his plan. The Planning Board disapproved the amended plan on the grounds that the land was now governed by the new zoning bylaw because the amended plan was submitted after the seven-month protection period.

The landowner argued that because the original definitive plan was submitted within seven months of the preliminary plan, he was entitled to a zoning protection. In support of his argument, he referred the court to the above-noted provision of Section 81U of the Subdivision Control Law which places no time limit on submitting an amended plan when the original definitive plan has been disapproved by the Planning Board. The court, in deciding against the landowner, determined that the Subdivision Control Law does not provide for such an open-ended process and places the responsibility on a landowner to present a definitive plan which is entitled to approval by the Planning Board. A zoning protection is lost if the definitive plan is not approved, and a landowner fails to appeal the disapproval pursuant to Section 81BB of the Subdivision Control Law.

ARENSTAM V. PLANNING BOARD OF TYNGSBOROUGH
29 Mass. App. Ct. 314 (1990)

Excerpts:

Ireland, J...

> In our view, the Land Court and the board were correct in ruling that G.L.c.40A, s.6, does not give "grandfather" protection to the locus in the circumstances disclosed. The apparent purpose of the requirement of s.6 that the

definitive plan be submitted within seven months of the date the preliminary plan was filed is to give the developer a reasonable time to work out details of an approvable plan with the planning board and the board of health, while at the same time avoiding an open-ended suspension of zoning amendments that are adopted by the town during the subdivision plan approval process. It is true that s.6 refers to a "definitive plan or an amendment thereof [which] is finally approved "; and that G.L.c.41, s.81U, puts no limit on the time a developer has to amend his plan so as to meet the board's reasons for disapproval. To preserve the sense of s.6, its reference to amended definitive plans must be read to apply only to those amended plans filed with the board within the seven-month period after submission of the preliminary plan. "[A]ny definitive plan, filed more than seven months after a preceding preliminary plan, is to be treated as a new plan, which gains protection...only from the date when it is filed and not as of the date of the filing of the preliminary plan."...

> Where a definitive plan is arguably entitled to approval by the planning board, a developer can preserve whatever rights he may have by filing an appeal under G.L.c.41, s.81BB, from a decision by the planning board disapproving the plan....This remedy, described in s.81BB,...as "exclusive," would preserve the grandfather protection of s.6 if it should be determined that the plan was, in fact, entitled to approval. Here, however, the plaintiff concedes that the definitive plan originally filed was not entitled to approval and that an appeal would have been fruitless. In these circumstances, having filed the original definitive plan at the end of the seven-month period prescribed by s.6, the plaintiff left himself no time within which to file an amended definitive plan under the provisions of G.L.c41, s.81U, that might be eligible for the protection of s.6.

As previously noted, the definitive plan zoning freeze protects the land shown on such plan from all zoning changes for an eight-year period. Within the eight-year period, a landowner may obtain a building permit based upon the zoning in effect at

the time the subdivision plan was first submitted to the Planning Board. After the eight-year period, the lots shown on the plan must conform to any zoning change which was enacted after the submission date of the original subdivision plan unless the lot has obtained some other zoning protection.

For example, a subdivision lot for single or two-family use can be protected from future increases in area, frontage or yard requirements if such lot is separately described and separately held at the time of the increased zoning requirements. For a more indepth review of the separate lot protection, see Land Use Manager, Volume 7, Edition Nos. 1, 3, 4, 5 and 6. It is not uncommon for owners of subdivision plans to "checkerboard" in order to obtain the separate lot protection for each lot. "Checkerboarding" is a practice whereby an owner conveys alternate lots to other persons, so no two adjacent lots would be in common ownership, and each lot would fall into the single and separate ownership category.

Prior to the enactment of the new Zoning Act (St. 1975, c.808, s.3), the old Zoning Enabling Act provided the following lot protection:

> Any lot lawfully laid out by plan or deed duly recorded, as defined in section eighty-one L of chapter forty-one...which complies at the time of such recording or such endorsement, whichever is earlier, with the minimum area...requirements, if any, of any zoning...by-law in effect in the ...town where the land is situated, notwithstanding the adoption or amendment of provisions of a zoning...by-law in such...town imposing minimum area...requirements...in excess of those in effect at the time of such recording or endorsement (1) may thereafter be built upon for residential use if, at the time of the adoption of such requirements or increased requirements, or while building on such lot was otherwise permitted, whichever occurs later, such lot was held in ownership separate from that of adjoining land located in the same residential district....

The key phrase under the old statute was "or while building on such lot was otherwise permitted." Under this provision, a subdivision lot could be "checkerboarded" at any time within the definitive plan protection period and be protected as a separate lot since "building on such lot was otherwise permitted" at the time of the conveyance.

When the Legislature rewrote the Zoning Act in 1975, they eliminated the "or while building on such lot was otherwise permitted" proviso. In Wright v. Board of Appeals of Falmouth, 24 Mass. App. Ct. 409 (1987), the court reviewed the existing separate lot protection provision of the Zoning Act and noted that a lot must be separately described and separately held at the time of zoning change in order to be protected as a separate lot. Therefore, the definitive plan zoning freeze is more limited today than it was under the provisions of the old Zoning Enabling Act. A landowner cannot "checkerboard" at any time during the eight-year period. Conveyance of a subdivision lot after the zoning change will not afford the lot separate lot protection.

WRIGHT V. BOARD OF APPEALS OF FALMOUTH
24 Mass. App. Ct. 409 (1987)

Excerpts

Cutter, J...

> The provisions of old c.40A, s.5A and old s.7A, so far as clearly continued at all (in respects here relevant) in new c.40A, are found in new c.40A, s.6. The first sentence of the fourth paragraph of new s.6, reads in part, "Any increase in area. . .of a zoning. . .by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage..." (emphasis supplied)... this sentence was interpreted in Adamowicz v. Ipswich, 395 Mass. 757, 762-763 (1985), S.C., 772 F..2d 5 (1st Cir. 1985), as providing that the new s.6 looks to the most recent instrument of conveyance prior to the zoning change to establish the meaning of that language. As to the increases in minimum lot size affecting the locus, both occurred prior to the "checkerboarding" conveyances effected by W&J on September 15, 1981. As of the date of each of these lot size increases, all the lots shown on the subdivision plan were still owned by W&J.... The new c.40A, s.6, thus affords each of the plaintiffs no protection from the present zoning by-law lot size requirements.

NOTICE OF PUBLIC HEARING ON PROPOSED ZONING AMENDMENTS:

As you are aware, Chapter 40A, Section 5, MGL, requires that the Department of Community Affairs (EOCD) must be notified as to any public hearing scheduled by the planning board relative to a proposed amendment to the local zoning bylaw or ordinance. In order for our records to show that we have been properly notified, such notices must be received by the Department prior to the scheduled hearing by the planning board.

In order to be assured that our records will reflect proper notice, please mail such public hearing notices to the following address:

Donald J. Schmidt
Executive Office of Communities
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100 Cambridge Street - Room 1803
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The Zoning Act also authorizes the Department to grant waivers of notice when a planning board fails to give proper notice to the Department. A waiver of notice can only be granted prior to town meeting or city council action on a proposed zoning change.

Zoning bylaws must be submitted to the Attorney General for approval pursuant to Chapter 40, Section 32, MGL. In the next edition of the Land Use Manager we will review some of the zoning bylaws which were disapproved by the Attorney General during 1989.

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EXECUTIVE OFFICE OF COMMUNITIES & DEVELOPMENT

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LAND USE MANAGER

ZONING BYLAWS
ATTORNEY GENERAL'S APPROVAL

After a town meeting has adopted a zoning proposal, the change must be submitted to the Attorney General for approval as required by Chapter 40, Section 32, MGL. The Attorney General's authority to disapprove a zoning bylaw is limited in that he may only disapprove a bylaw if it violates state procedural or substantive law. If the Attorney General disapproves a zoning bylaw, he must give written notice to the Town Clerk stating the reasons for disapproval.

Chapter 40A, Section 5, MGL, provides a specific procedure a municipality must follow when adopting or amending its zoning bylaw. It is important that local officials understand the procedural requirements to avoid having the Attorney General disapprove a by-law due to a procedural defect. Local governments have the power to enact zoning bylaws to regulate land use and every presumption is to be made in favor of the validity of such bylaws. In reviewing the substance of a particular zoning bylaw, the Attorney General may disapprove the bylaw if he finds that the zoning regulation is inconsistent with the constitution or laws of the Commonwealth.

Landlaw, Inc. provides professionals with up-to-date information on local land use regulations. Located in Waltham, Landlaw maintains zoning information on all 351 Massachusetts municipalities.

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Recently, Landlaw prepared a report for the Executive Office of Communities and Development (EOCD) summarizing the zoning bylaws which were disapproved by the Attorney General during 1989. Due to the length of the original document, Landlaw prepared a condensed version of the report which we have reproduced in this edition of the Land Use Manager. Some of the mistakes which caused the Attorney General to disapprove a zoning bylaw included the following:

- Planning Board failed to submit a report to town meeting and 21 days had not passed between the date of the Planning Board hearing and town meeting.

- Planning Board public hearing notice only made reference to a public hearing on "proposed amendments" which was determined not to sufficiently identify the subject matter of the public hearing.

- Notice of the Planning Board public hearing did not appear once in each of two successive weeks in the newspaper.

- Planning Board failed to hold a public hearing.

- Public hearing notice was only published 10 days prior to the hearing.

- Zoning proposal failed to obtain the two-third vote requirement.

- Planning Board failed to send public hearing notice to EOCD.

- Planning Board public hearing was held after town meeting vote.

- Planning Board hearing was held more than 6 months before town meeting vote.

Some of the zoning proposals which were disapproved because of substance included the following:

- Zoning proposal changed certain industrial districts to commercial districts where solid waste disposal facilities were not permitted. Prior to this amendment, solid waste disposal facilities were allowed by special permit in the town's industrial zones. This special permit authorization was in effect as of July 1, 1987. The zoning proposal was disapproved because it was inconsistent with G.L. c.40A, s.9, which states, in part, that a town shall not adopt a bylaw prohibiting the siting of a solid waste disposal facility or the expansion of an existing facilty on any locus zoned for industrial use unless such prohibition was in effect on or before July 1, 1987.

- Zoning proposal would have prohibited the installation of sewer treatment plants or community subsurface disposal systems by private developers unless such installation was jointly approved by the Planning Board, Board of Health, and Board of Sewer Commissions. The zoning proposal was disapproved because there were no standards to guide the review boards in deciding whether to grant or deny the installation, leaving the boards with unrestrained discretion. A bylaw must contain standards to guide review boards, otherwise a landowner is deprived of any basis on which he might appeal for some determination of the propriety of the conduct of a review board.

- Zoning proposal would have allowed owners of structures in which residential units were illegally created prior to a certain date, to apply for a special permit to legalize the units. The bylaw was disapproved because it purported to delegate to the Board of Appeals power to bring about situations where the regulations and restrictions would not be uniform for each class or kind of building, structure, or land, and for each class or kind of use throughout each district as required by Section 4 of the Zoning Act. It opened the door to discrimination not based upon valid differences. Effectively, the amendment would have authorized spot zoning.

- Zoning proposal would have had the effect of allowing all uses within a particular zone only upon the issuance of a special permit. The bylaw was disapproved as the establishment of an all-special permit zone is inconsistent with the provisions of the Zoning Act.

- Zoning proposal would have prohibited the construction of metal-clad or plastic-clad buildings in a business district. The bylaw was disapproved because it was inconsistent with G.L. c.40A, s.3, which specifies that no zoning bylaw shall regulate or restrict the use of materials or methods of construction of structures regulated by the State Building Code.

- Zoning proposal would have required, in certain business districts, a buffer strip on any lot for multifamily use which abuts a premise used residentially. Premises used residentially in business districts were nonconforming. The bylaw was disapproved because it was inconsistent with the uniformity requirement of Section 4 of the Zoning Act.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
12 JAN 1989	Disapproved	STM 11/14/88

ARTICLE #	CLASSIFICATION	DESCRIPTION
18	Zoning Districts/Boundaries	Extent of RO district along Auburn street changed from 200' from the centerline of the road to 200' from the sideline of the road. Disapproved by the Attorney General because no publication, posting or notification of the public hearing took place.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
22 AUG 1989	Disapproved	ATM 5/02/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
16	Buffer Area {Greenbelt}	Greenbelt by-law for the town's industrial districts. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing in violation of Section 5 of the Zoning Act.
46	Lot Area {Density Revision}	Increase in the required minimum lot area for apartments. Prior to amendment, 10,000 s/f was required for the first unit and 5,000 s/f for each additional unit, up to 15 units. Beyond 15 units, 3,000 s/f was required. The new rules impose a minimum lot area of 12,500 s/f with 8,000 s/f for additional units. The new requirements are somewhat more stringent for projects within the Residence B district. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing in violation of Section 5 of the Zoning Act.
49	Parking {Substantive Amendments}	Increase in the required parking spaces for multi-family projects from 2 to 3 per unit. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing in violation of Section 5 of the Zoning Act.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
01 AUG 1989	Disapproved	STM 5/01/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
24	Zoning Districts/Industrial	New provision would have changed the names of the industrial districts to "commercial" districts, added a new definition for "commercial district" and established a new table of uses in an attempt to prohibit the siting of a solid waste disposal facility. Disapproved by the Attorney General as violative of c. 40A, Section 9 because a city or town may not adopt an ordinance or by-law prohibiting the siting of a solid waste disposal facility on any locus zoned for industrial use as of July 1, 1987. Because solid waste disposal facilities were allowed by special permit in the Town's industrial zone as of July 1, 1987, the "prohibition" voted under Article 21 was void.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
30 JAN 1989	Disapproved	STM 10/17/88

ARTICLE #	CLASSIFICATION	DESCRIPTION
27	Rezoning// Bus > Res	Property on Route 6A from Commercial Low Density to Residential Medium Density. Disapproved by the Attorney General because both the warrant and the legal notice indicated that what was to be considered relative to the described area was a zoning change from Commercial Low Density to Village Business, not Residential Medium Density. Thus, neither the warrant wording requirements of G.L. c. 39, Section 10 nor the public notice requirements of G.L. c. 40A, Section 5 were satisfied.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
07 FEB 1989	Disapproved	STM 10/25/88

ARTICLE #	CLASSIFICATION	DESCRIPTION
21	Rezoning// Ag > Bus	Property on Route 20 and Old Worcester Road from Agricultural to Community Business. Disapproved by the Attorney General because the Planning Board hearing was only legally noticed once and not "once in each of two successive weeks", as is required by G.L. c. 40A, Section 5. Citing Hallenborg v. Town Clerk of Billerica, 360 Mass. 513 (1971).

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
22 MAY 1989	Disapproved	STM 9/9/87

ARTICLE #	CLASSIFICATION	DESCRIPTION
9	Flood Plain	Adoption of a new Flood Plain district by-law. Disapproved by the Attorney General because the Planning Board hearing to consider this amendment was held over two months AFTER the Town Meeting vote. Chapter 40A, Section 5 contemplates the Planning Board public hearing be held before the Town Meeting vote.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
07 DEC 1989	Disapproved	ATM 6/01/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
16	Flood Plain	Adoption of a new Flood Plain district. Disapproved by the Attorney General because the Planning Board failed to notify EOCD of the public hearing to consider the zoning amendment.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
10 APR 1989	Disapproved	STM 1/23/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
13	Rezoning// Var > Bus	Expansion of the Commercial Industrial district known as the Denison Lumber Mill District to include various parcels on Assessors' map 419. Disapproved by the Attorney General because the warrant indicated that Map 419 - Parcels 8,9,13 & 14 would be rezoned whereas the Town Meeting voted to rezone these parcels and portions of Parcel 7. The portion of Parcel 7 voted to be rezoned contained approximately 40 acres and the balance of the rezoning contained 42.33 acres. The Attorney General found this difference to be significant since the voters reviewing the Town Meeting warrant and map 419 would have had no way of knowing that a 40 acre portion of parcel 7 was to be considered for rezoning. Therefore, the subject matter of the rezoning of part of parcel 7 was not contained in the warrant and could not be validly acted upon at Town Meeting. Citing Nelson v. Belmont, 274 Mass. 35 (1931) and Fish v. Canton, 322 Mass. 219 (1948).

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
14 FEB 1989	Disapproved	ATM 10/17/88

ARTICLE #	CLASSIFICATION	DESCRIPTION
38	Sewage Treatment Plant	By-law provision would have required the installers of Sewage Treatment Plants or Community Subsurface Disposal Systems to secure the joint approval of the Planning Board, Board of Health and Sewer Commissioners. Disapproved by the Attorney General because the proposed amendment was "...devoid of any standards whatsoever to guide the specified boards in deciding whether to grant or withhold such approval." Citing Commonwealth v. Protami, 354 Mass. 210, 211 (1968) and City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. ___, 108 SC 2138 (1988).

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
17 NOV 1989	Disapproved	STM 6/26/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
5	Design Review	Architectural compatibility standards added to the Granby zoning by-law with respect to projects within the Route 202 commercial corridor. Disapproved by the Attorney General because the first publication of the legal notice of the Planning Board's public hearing occurred 13 days before the hearing. Section 5 of c. 40A requires a 14 day notice.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
17 NOV 1989	Disapproved	STM 6/26/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
6	Rezoning// Var > Ag	Rezoning of various parcels throughout Granby to the Agricultural Preservation district. Disapproved by the Attorney General because the first publication of the legal notice of the Planning Board's public hearing occurred 13 days before the hearing. Section 5 of c. 40A requires a 14 day notice.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
30 AUG 1989	Disapproved	ATM 5/01/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
17	Building Regulation	By-law amendment would have banned the construction of metal clad or plastic clad buildings in the Business and Industrial district. Disapproved by the Attorney General because Section 3 of c. 40A specifies that "no zoning ordinance or by-law shall regulate or restrict the use of materials or methods of construction of structures regulated by the state building code."

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
14 FEB 1989	Disapproved	STM 11/15/88

ARTICLE #	CLASSIFICATION	DESCRIPTION
11	Wetland {Limited Project Exception}	Amendment would have prohibited the alteration of driveways of 5,000 s/f or more of combined W district and/or Inland Wetlands. Disapproved by the Attorney General because the legal notice and warrant made reference to a restriction on the length of a driveway crossing wetlands of more than 150' and did not mention the alteration of 5,000 s/f or more of wetland area. The Attorney General found this difference to be substantively significant and determined the public notice requirements of G.L. c. 40A, Section 5, and the warrant wording requirements of G.L. c. 39, Section 10 had therefore not been met. Citing Nelson v. Belmont, 274 Mass. 35 (1931) and Fish v. Canton, 322 Mass. 219 (1948).

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
18 SEP 1989	Disapproved	ATM 5/01/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
36	Uses/Inn	Deletion of by-law provisions allowing the rental of no more than 3 rooms in an existing dwelling. Disapproved by the Attorney General because the Town Meeting vote did not meet the two-thirds requirement for zoning by-law amendments set forth in c. 40A, Section 5. This warrant article was subsequently approved by the Attorney General upon reconsideration on November 7, 1989 after the Town Clerk submitted a "corrected" vote count.
38	Uses/Commercial	Proposed amendment would have changed 23 commercial, retail and residential uses formerly allowed by right to specially permitted uses in the Business II district. Disapproved by the Attorney General because the ultimate effect of the amendment would have been that all uses within the zone, with minor exceptions, would have been allowed by special permit only, citing, SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101, 108 (1984) (Invalidated Braintree zoning by-law requiring a special permit for all uses in the Town's business districts on the grounds that Section 4 of the Zoning Act does not contemplate, once a district is established and uses within it authorized by right, the conferral on local zoning boards of a "roving and virtually unlimited" power to discriminate as to uses between landowners similiarly situated.).

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
05 JUL 1989	Disapproved	ATM 4/24/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
29	Buffer Area {Greenbelt}	Amendment would have had the effect of requiring a "buffer strip" on any lot in a Business District on which a multi-family dwelling is placed which abuts premises used residentially. Disapproved by the Attorney General as violative of the district uniformity requirements of c. 40A section 4. Under the provisions of the Medfield zoning law, premises used residentially in a Business-Industrial district are non-conforming. The by-law would have resulted in the unequal treatment of areas within a zone near parcels dedicated to non-conforming uses. Additionally, once a non-conforming residential use is changed to a conforming use, the buffer requirement would be eliminated thereby effectuating the amendment of a zoning restriction without the benefit of a Town Meeting vote, citing SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101 (1984).

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
28 APR 1989	Disapproved	STM 2/27/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
8	Rezoning// Bus > Res	Rezoning on Route 47 from Commercial to Rural Residential. Disapproved by the Attorney General because the legal notice for the public hearing did not appear once in each of two successive weeks as required by G.L. 40A, Section 5. Citing Crall v. Leominster, 362 Mass. 95 (1972). Additionally, G.L. c. 40A, Section 5 indicates that "if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until a subsequent public hearing is held with notice and report as provided." The time frame between the hearing and the town meeting action exceeded the six month limitation in this case.

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
05 JUL 1989	Disapproved	ATM 5/1/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
42	Definition/Frontage	Definition of "frontage." Disapproved by the Attorney General on the grounds that the public hearing to consider this amendment occurred more than 6 months before the date of the Town Meeting in violation of c. 40A, Section 5 (3rd Paragraph).

{TOWN}

ACTED ON	STATUS	TOWN MEETING DATE
30 JUN 1989	Disapproved	STM 4/25/89

ARTICLE #	CLASSIFICATION	DESCRIPTION
17	Uses/Antique Stores	By-law would have allowed antique shops to operate in residential districts without the requirement of their being an accessory use to a single family dwelling. Disapproved by the Attorney General because the record of the action taken at Town Meeting did not satisfy the requirement that the two-thirds count be taken and the vote recorded in the records of the clerk, as required by c. 39, Section 15.

Commonwealth of Massachusetts
Executive Office of Communities
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